BARBADOS

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL

CIVIL APPEAL No 11 of 2011

IN THE MATTER OF AN APPLICATION UNDER SECTION 19(8) OF THE BARBADOS INTERNATIONAL COMMERCIAL ARBITRATION ACT 2007

AND IN THE MATTER OF AN ARBITRATION BEFORE HENRI C. ALVAREZ, QC CONDUCTED UNDER THE INTERNATIONAL ARBITRATION RULES OF THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

BETWEEN

AUTO-GUADELOUPE INVESTISSEMENT S.A.	**APPLICANT**
AND	
COLUMBUS ACQUISITIONS INC.	**FIRST RESPONDENT**
COLUMBUS HOLDINGS FRANCE S.A.S	**SECOND RESPONDENT**
CARIBBEAN FIBER HOLDINGS LP	**THIRD RESPONDENT**

Before the Honourable Marston C. D. Gibson, Chief Justice

2012: 28 September, 2 October

Mr. Garth Patterson Q.C. with Ms. Onika Stewart for the Applicant
Mr. Andrew Thornhill and Ms. Shontelle Murrell of Messrs George Walton Payne and Co., for the First and Second respondents
Sir Henry Forde Q.C. with Mr. Ramon Alleyne and Ms. Shena-ann Ince of Messrs Clarke, Gittens and Farmer, for the Third Respondent

DECISION

GIBSON CJ:

Introduction

[1] This application is the latest salvo in the litigation brought under the ***International Commercial Arbitration Act,*** **Cap 110 B (**"**ICAA**"**)** and the ***Supreme Court (Civil Procedure) Rules*** **2008**, as amended in 2009, ("CPR") between the captioned parties. The applicant, Auto-

Guadeloupe Investissement S.A. (AGI), seeks an Order that: *(1)* all proceedings before arbitrator Michael Lee ("the current arbitrator") to assess damages pursuant to a partial award on liability rendered on 29 March 2011 ("the award") by arbitrator Henri C. Alvarez, QC ("the former arbitrator") be stayed forthwith, pending the hearing and determination of proceedings filed herein; and *(2)* the costs of and incidental to this application be AGI's costs in any event.

Factual and Procedural Background

[2] The facts underlying this application are much more fully stated in a companion Decision soon to be delivered by a full panel of the Court of Appeal (***Gibson CJ, Peter Williams and Mason, JJA***), and so they can be kept narrowly focussed. After extensive negotiations in July 2008 between Columbus Acquisitions Inc., ("CAI"), a company with principal offices in Bridgetown, Barbados, and Columbus Holdings France S.A.S. ("CHF"), a company with registered office in Paris, France, on the one hand, and Auto-Guadeloupe Investissement SA (AGI), a company with registered offices in Pointe-a-Pitre, Guadeloupe, and Caribbean Fiber Holdings L.P. (CFHL), a company whose registered agent is located in Delaware, United States, on the other, CAI and CHF agreed to purchase from AGI and CFHL all the assets of a company called Global Caribbean Fiber SAS ("GCF"). On 3 March 2009, the parties entered into a Memorandum of Terms ("the MOT") which was to govern their negotiations for the sale of GCF. The MOT contained a choice of jurisdiction clause selecting Barbados.

[3] The MOT also contained an arbitration clause providing for the appointment of a single arbitrator to resolve any disputes arising under its terms. As a consequence of an alleged violation by AGI and CFHL of the agreement for sale, on 19 July 2009, CAI and CHF filed a demand for arbitration against AGI and CFHL pursuant to the rules of the International Centre for Dispute Resolutions ("ICDR") seeking, *inter alia*, specific performance and damages for AGI's refusal to consummate the sale. In a statement of defence and cross claim filed on 12 August 2009 in the same arbitration proceeding, CFHL also sought specific performance and damages against AGI. For present purposes, CAI, CHF and CFHL are called "the respondents."

[4] The parties agreed that the former arbitrator, Mr. Alvarez QC, a Canadian attorney with offices in Vancouver, British Columbia, would be the sole arbitrator to determine the dispute. In November 2009, the former arbitrator issued a procedural order ("the Order"), to which all the parties also agreed, setting out the timetable for the filing and exchange of documents. The Order also stated that the issue of damages would be heard separately from the issues of liability and specific performance. No issue regarding the former arbitrator's jurisdiction was raised by any party at this time, or at any time prior to the arbitrator's award.

[5] On 19 March 2011, having heard the parties, the arbitrator made a partial award on liability finding, *inter alia*, that AGI had breached the agreement of 17 April 2009 to sell GCF. The arbitrator then indicated that he would assess the damages for AGI's breach in

the second phase of the arbitration. On 3 June 2011, AGI filed an objection to the arbitrator's jurisdiction to determine the issue of damages. After receiving submissions from all parties, the arbitrator issued a partial award on jurisdiction on 19 July 2011 stating that he had jurisdiction to determine the issues that the parties had previously agreed would be reserved for the second phase of the arbitration.

[6] On 18 August, 2011, AGI commenced proceedings in this Court by way of Fixed Date Claim Form and, on 21 November 2011, AGI filed an Amended Fixed Date Claim Form and Statement of Claim. "Concurrently with these proceedings", AGI filed an application with the ICDR challenging the appointment of the former arbitrator on the basis that he was neither independent nor impartial.

[7] On 28 November 2011 and 13 December 2011, this Court (***Gibson CJ, Peter Williams and Mason, JJA***) heard arguments in an *in limine* application by the respondents. Meanwhile, on 9 December 2011, the ICDR notified the parties that it had refused AGI's application challenging the partial award made by the former arbitrator. The ICDR also informed the parties that the former arbitrator had resigned and had been replaced by the current arbitrator, Mr. Lee, to act as sole arbitrator in the damages phase of the arbitration proceedings.

[8] The current arbitrator has scheduled a meeting of all counsel for the parties to be held on 4 October 2012 in New York. On 24 August 2012, AGI, by its counsel, requested the current arbitrator to postpone the meeting and to stay the proceedings pending the determination of the proceedings in this Court. The respondents disagreed and urged the current arbitrator to proceed promptly to a hearing on the damages phase of the arbitration. The current arbitrator has asked all counsel to submit briefs on the issue whether the arbitration ought to be stayed and has indicated that, either at the meeting of 4 October or shortly thereafter, he will rule whether the application is to be stayed or whether he will proceed to the damages hearing. As has been made clear in the respondents' written submissions, AGI has also commenced proceedings in Point-a-Pitre, Guadeloupe.

[9] AGI takes the view that, insofar as the damages phase is founded on an award by the former arbitrator, whom it describes as "the Impugned Arbitrator", the award is null and void, or voidable, and no proceedings should be allowed to continue on the basis of an invalid award. Since this Court has been asked, AGI argues, to determine the issue of the validity of the award, which application is still pending, then to permit the damages phase to proceed before the current arbitrator when AGI might be successful before this Court, could lead to the parties incurring and wasting legal fees and arbitration costs, and render nugatory any decision made in AGI's favour. AGI contends that the instant application is in the interest of doing justice and saving costs.

[10] The respondents argue that, under the ICAA, the Court lacks the power to stay the arbitration and urge the Court to refuse the application. For the reasons which follow, the

Court agrees with the respondents and determines that the application for a stay must be denied, with costs.

[11] As a preliminary point, counsel for AGI argued that the application seeking a stay ought to be heard by a full three-member panel of the Court of Appeal rather than by a single judge. He based his argument solely on the phrase "Court of Appeal" which appears in several sections of the **ICAA**, for example, sections 9, 16 (4), 17 (2), 19 (8) and 47 (2). Other than that, he cited no support for his position. Section 53 (2) of the ***Supreme Court of Judicature Act, Cap 117A***, provides that "[s]ubject to subsection (4), a single judge of the Court of Appeal may, as he thinks fit, in any cause or matter pending before that Court, (a) give any directions incidental to the appeal and not involving the decision of the appeal . . ." And subsection (3) of the same section provides that "every order made under subsection (2) by a single judge, other than an order granting leave to appeal, may be discharged or varied by the Court of Appeal."

[12] It is clear that the relief sought is interlocutory and in the nature of issuing directions rather than determinative of the underlying proceeding. Moreover, the statute permits the applicant to seek review by a full panel of the Court which is authorised to vary or discharge the single Judge's order. The **ICAA** is based on the **Model Law** ("ML") propounded by the **United Nations Commission on International Trade Law** ("**UNCITRAL**") but the statute draws no distinction between full panels of the Court of Appeal and single judges of that Court. In ***ABC Co v XYZ Ltd***, ***[2003] 3 SLR (R) 546***, ***Judith Prakash J*** observed, at para. 11, that "while prescribing the situations in which parties can have access to a domestic judicial system and also prescribing the relief which can be granted by that system in relation to the arbitration, the Model Law does not attempt to prescribe the procedure to be used but leaves this to the rules of the relevant domestic judicial system."

[13] The main issue in this application is whether the Court of Appeal is empowered to stay an arbitrator in an international commercial arbitration within the language of the ICAA. Section 8 of the ICAA provides that "[i]n matters governed by this Act, *no court shall intervene except where so provided in this Act*." (Emphasis added). In ***NCC International AB v Alliance Concrete Singapore Pte Ltd***, ***[2008] 5 LRC 187***, the Singapore Court of Appeal, per ***VK Rajah JA***, observed (at para. 20) that " the courts have a conspicuously circumscribed role in relation to all arbitration proceedings." Referring to s. 5 of the Singapore International Arbitration Act, [s. 8 of the **ICAA**], ***VK Rajah, JA*** explained, (at para. 22), citing the *Analytical Commentary on the Draft Text of a Model Law on International Commercial Arbitration*: *Report of the Secretary-General* (18th Session, UN Doc AICN. 9/264 (1985)) that the "provision requires all instances of court involvement in arbitration proceedings to be specifically stated, thus excluding any general or residual powers of domestic courts in relation to matters which are prescribed as governed by the Model Law. The rationale here is to engender certainty for both arbitral parties and arbitrators alike as to the instances in which curial supervision or assistance is to be

expected, such certainty being regarded as beneficial to international commercial arbitration." He concluded, at para. 23, that "[t]he powers of the Singapore courts in respect of international arbitration are therefore listed exhaustively in the IAA where matters governed by the Model Law are concerned."

[14] It is convenient at this juncture to set out the relevant provisions of the ICAA. Section 16 deals with the procedure to challenge an arbitrator, and s. 16 (4) provides that where a challenge is unsuccessful, "the challenging party may, within 30 days after receiving the decision rejecting the challenge, request the Court of Appeal to decide on the challenge; and that decision is not subject to an appeal." Section 16 (5) provides, in unambiguous language, that "[w]hile a request made pursuant to subsection (4) is pending, the tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award." Similarly, s. 17 deals with an arbitrator's inability or failure to act and s. 17 (2) provides that, in the case of a controversy, any party may request the Court of Appeal to decide on the termination of the arbitrator's mandate which decision is, again, not subject to an appeal.

[15] Section 19 is the general section dealing with the jurisdiction of the arbitral panel. Section 19 (1), encapsulating both of the "pillars" of the ML, namely "Competence-Competence" and "separability" (discussed more fully at paras. 18-20 below) provides that "[a]n arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement and, for that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract." Section 19 (8) states that where the arbitral panel rules as a preliminary question that it has jurisdiction, any party may, within 30 days, "request the Court of Appeal to decide the matter", which decision shall not be subject to an appeal.

[16] Neither s. 16, 17 or 19, each of which relates to the pre-award situation, permits a stay of the arbitration as one of the items of available relief. Indeed, s. 19 (9) states quite peremptorily, and in substantially similar language to that in s. 16 (5), that "[w]hile a request made pursuant to subsection (8) is pending, the tribunal may continue the arbitral proceedings and make an award." Section 47 is entitled *Recourse Against Award* and obviously is applicable to post-award situations. Subsection (1) provides that "[r]ecourse to a court against an arbitral award may be made only by an application for setting aside in accordance with subsections (2), (3) and (4)." Those three subsections then set out both the grounds upon which the Court of Appeal may set aside an award as well as the time period within which such an application may be filed.

[17] The parties devoted much time to s. 47 (5) which provides that "[w]here an application is made to the court to set aside an award, the court may, where appropriate and so requested by a party, *suspend the setting aside proceedings* for a period of time determined by the court *to give the tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the tribunal will eliminate the grounds for setting asid*e." (Emphasis added). What is clear then is that, even where an application is made to set

aside an award, the court, rather than stay the arbitrator, may be requested to stay *its own proceedings* to permit the arbitral tribunal first to take corrective or other action, if so required.

[18] This conferral of power on the arbitral tribunal to rule on its own jurisdiction, even where its jurisdiction is challenged, is consistent with what Dr. Peter Binder in his seminal work **International Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions** (3rd Edn) at para. 4-004 refers to as one of the two "pillars" of the ML, namely the doctrine of Competence-Competence, the other pillar being "separability." Binder explains, at paras. 4-006 to 4-007, pp. 214-215, that Competence-Competence

> "describes the principle that an arbitral tribunal may rule on its own jurisdiction, meaning that the tribunal can independently determine its own power to resolve a certain dispute without having to apply to a court for authorisation. Modern international commercial arbitration embraces this principle and the arbitrator's right to rule on his own jurisdiction is one of the reasons why arbitration has flourished so greatly over the past decades. . With the adoption of the principle of [Competence-Competence] and by granting an arbitrator the power to rule on his own jurisdiction, the adopting state demonstrates its undivided support for international commercial arbitration."

[19] The imposition of a stay precluding an arbitral tribunal from ruling on its own jurisdiction appears to be entirely antithetical to the Competence-Competence principle embodied in s. 19 (1) of the **ICAA**. Persuasive and compelling authority for this proposition can be found in the decision in ***Mitsui Engineering & Shipbuilding Co Ltd v Easton Graham Rush and another***, ***[2004] 2 SLR (R) 14***. In that case, the plaintiff, ***Mitsui***, sought an interlocutory injunction against the first defendant, ***Mr. Easton***, staying an arbitration in which ***Easton*** was the arbitrator. ***Easton*** issued an interim award and ***Mitsui***, dissatisfied with the interim award, challenged ***Easton's*** position as arbitrator on the broad ground that he had exceeded his jurisdiction. ***Mitsui*** argued that there should be no further hearing before ***Easton*** since it might be "irrevocably prejudiced to an extent that damages cannot compensate." After hearing arguments, the High Court of Singapore was of the view that it had no jurisdiction, or power, to grant the interlocutory injunction and, after hearing further arguments, the Court maintained its decision and dismissed the application.

[20] ***Woo Bih Li, J*** commenced his analysis with the observation that it was "not in dispute that the scheme and intention behind such arbitrations [under the UNCITRAL ML] is minimal court involvement, but, that is not to say that court involvement is excluded entirely." His Lordship continued, at paras. 23 to 24, that "[i]t seemed to me that ***Mitsui's*** argument went against the terms of Art 5 [s. 8 of the ICAA] which states that in matters governed by the [ML], no court shall intervene 'except where so provided' in the [ML]. Since the [ML] does not provide for the Interlocutory Injunction . . . the court does not have the power to do so. It will be recalled that the last clause of Art. 13 (3) [ss. 16 (4) and 16 (5) of the

ICAA] allows an arbitrator to continue the arbitral proceedings and even make an award pending the outcome of the court's ruling on the challenge. In my view, this clause hints that it is for the arbitrator, and not the court, to decide whether the arbitral proceedings should be stayed in the meantime."

[21] Counsel for AGI sought, unsurprisingly, to distinguish ***Mitsui***. He contended that ***Mitsui*** improperly ignored the maxim of statutory interpretation *expressio unius est exclusio alterius*, that is, the expression of one concept implies the exclusion of the other. He argued that the absence of stay provisions in ss. 16, and 19 (*unus*), when compared with the existence of stay provisions in s. 47 *(alter*), suggests that when operating under s. 47, the court's full armoury of powers within the CPR, particularly Rule 26.1, is activated with the result that the Court is empowered to stay an international commercial arbitration. The argument lacks merit.

[22] The critical statutory maxim applicable to this case is not *expressio unius* since the stay provisions in s. 47 (5) are, in fact, complementary of, and not in contradistinction to, ss. 16 and 19. Like those provisions, s. 47 (5) permits no stay of the arbitral proceedings but of the court's set aside proceedings. In all of the provisions, therefore, the statue expresses a preference for the continuation of the arbitral proceedings. The relevant maxim is *generalia specialibus non derogant*, that is, that general provisions do not derogate from specific provisions.

[23] A closer read of the ***Mitsui*** case reveals that ***Justice Woo Bih Li*** relied on this rule of interpretation. At paras. 25 to 27 of his judgment, ***Justice Li*** cited extensively from Holtzmann and Neuhaus ***A Guide to the UNCITRAL Model Law on International Commercial Arbitration*: *Legislative History and Commentary*** **(Kluwer 1989)**. The *Guide* refers to proposed modifications to the Model Law which would have permitted the court, and not only the arbitral tribunal, to order a stay of proceedings. However, in a footnote, the *Guide* cites the Commission Report A/40/17 at para. 123, where the Commission rejected that view. The *Guide* then states that "[a] court is thus barred by Article 5 of the [ML] from issuing such a stay. In this respect, the [ML], as *lex specialis*, supersedes any domestic laws authorizing such stay orders" (***Mitsui***, para. 26). Hence the very general procedural provisions of the CPR (*generalia*) cannot derogate from the highly specialised substantive provisions in the ICAA (*specialibus*).

[24] For all the above reasons, the application of AGI seeking, in this Court, a stay of the arbitral proceedings lacks any basis in the ICAA and is therefore denied, with costs.

Chief Justice